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RIMINI STREET, INC. and SETH RAVIN

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, v. RIMINI STREET, INC. , a Nevada corporation; SETH RAVIN, an individual, Defendants.	Case No. 2:10-cv-0106-LRH-PAL **DECLARATION OF BROOKS L. HILLIARD IN SUPPORT OF RIMINI'S OPPOSITION TO ORACLE'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **[REDACTED]**

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DECLARATION OF BROOKS L. HILLIARD CMC, CCP

I, Brooks L. Hilliard, declare as follows:

1.   I have been retained by counsel for the Defendants in connection with this matter. I have attached a description of my accomplishments and relevant experience in my professional biography, attached as Exhibit 31. I am over 18 years of age and am mentally competent to make this declaration.

2.   My educational background includes an M.B.A. from Harvard Business School and a Baccalaureate degree in mechanical engineering with Deans' List academic honors from the Massachusetts Institute of Technology. In addition, I have lectured on computer systems and programming for the Arizona State University School of Business and the American Management Association. I held both line and staff positions for several major computer companies where I had responsibilities in the areas of designing, developing, marketing and supporting a wide variety of computer products used in both business and government applications.

3.   Over the past 31 years, I have consulted to more than 200 companies, governmental agencies and not-for-profit organizations regarding issues related to the selection, implementation and ongoing support of business computer applications (including both hardware and software) to perform functions comparable to the enterprise applications marketed and supported by Oracle. In particular, I have consulted to clients that had licensed or were considering the license of Oracle's PeopleSoft, J.D. Edwards, Siebel, and/or Oracle E-Business Suite applications (or their predecessors).

4.   I have reviewed more than 300 business system contracts (nearly all of which were either solely software licenses or included software licenses as part of a package that also included related hardware purchase and/or service contracts), and acted as a contract negotiator in more than 100 instances for consulting clients that were licensing business software for their use. I have also reviewed more than 100 additional software licenses in the course of various expert witness engagements where the licensed software was at issue in the litigation for which I was

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1   engaged. Many of these licenses were for Oracle software, and nearly all were for business software

2   products that performed ERP or similar applications, comparable to those performed by Oracle's

3   ERP and database products.

4   5.   In regard to this matter, I have reviewed information from Rimini Street

5   including information regarding their technical practices and procedures; I have reviewed Oracle

6   documents including license agreements for the software-at-issue and technical documents and

7   recommendations provided by Oracle to its licensees; I have reviewed documents relating to the

8   customs and practices of software vendors, their licensees, and various third party support providers

9   in the ERP software industry.

10   6.   This case involves complex software platforms known as Enterprise Resource

11   Planning (ERP) systems. By the mid-1990s, ERP applications provided the ability to computerize

12   functions across the entire organization where they were implemented. By the decade of the 2000s,

13   the most successful developers of such enterprise software applications were Oracle, PeopleSoft,

14   J.D. Edwards, Siebel (CRM only) and SAP. Today, ERP systems are used primarily by large and

15   mid-size organizations to integrate internal and external management information, with the goal of

16   managing customer relationships, accounting, finances, supply chains, and human resources within a

17   single software platform.

18   7.   Due to different customer's unique business needs and because of changes in

19   business conditions and regulatory requirements (including such things as payroll taxes), many users

20   of such enterprise software products have never found it feasible to use them without some level of

21   customizations and/or periodic updates. To allow such customizations and updating (among other

22   reasons), most major ERP software developers (including Oracle) routinely grant their customers

23   access to some or all of the source code for the licensed applications to allow for these needed

24   customer modifications. Nonetheless, source code access of this nature is not typically required for

25   many other common software support activities. In particular, it is not required when either

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1   (a) installing the ERP software (prior to any modifications being made) or (b) copying the software

2   in accordance with the allowed copying specified in the ERP software license.

3   8.   Instead of requiring all their customers to make the changes needed to comply

4   with these necessary changes themselves, ERP software developers began offering support contracts

5   to their customers covering software updates needed to stay current and also including repairs to any

6   defects that might be uncovered.   This practice created new problems for the major software

7   developers, however, because once the customers had modified the software to meet their individual

8   requirements, the regular updates and repairs that the developers produce, test and release

9   periodically for the standard versions of the software might no longer work properly with the

10 modified versions of the software in use in their customers' businesses.

11   9.   To address the needs of their clients, all of the major software developers

12 began offering consulting and programming services so that customers that did not want to use their

13 own employees for customization and modification could contract out these services. Additionally,

14 the major ERP software developers, including SAP, Microsoft, Oracle, PeopleSoft, J.D. Edwards

15 and Siebel, began referring existing and prospective licensees to third party consultants and

16 consulting firms to: market their enterprise applications software products; install and configure the

17 software; make custom modifications if needed; develop customized add-on functionality needed to

18 meet requirements of specific industries; and provide ongoing support for such modifications when

19 the changes rendered them ineligible for standard support from the developer itself.

20   10.   By the early 1990s, a service industry emerged consisting of independent

21 consultants, programmers and consulting firms that had developed specific implementation and

22 support expertise for each of the major developers' products. One portion of this industry includes

23 the developers' designated "business partners", and every major enterprise software developer

24 (including Oracle) set up official business partner networks. The software developers, including

25 Oracle, rely upon these networks of business partners to implement, customize and otherwise

26 support its ERP licensees.   Licensees often engage third parties to implement, customize and

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1 otherwise support the software, as they often lack the requisite in-house resources. Over the past 30

2 years, I have worked with dozens of clients that have implemented enterprise software systems,

3 including Oracle, PeopleSoft and J.D. Edwards, and that acquired these systems through third party

4 consultants and/or engaged such consultants for the implementation and on-going services in

5 conjunction with these systems.

6   11.   Enterprise software support – whether done by the developers of the software,

7 licensees of the software, or consultants engaged by the licensees – requires the creation of multiple

8 non-production copies of the software applications being supported. Oracle's technical

9 documentation relating to software copies reflects these normal and customary industry practices and

10 encourages its licensees to create multiple copies of its software environments. █████████

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12 ██

13 Likewise, Oracle further explains, "Throughout the implementation process, your testers need to

14 constantly test the application to make sure that it performs properly. Your team would also be

15 constantly migrating configuration changes from development to test to staging environments.

16 Ultimately, when you are ready to go live with your PeopleSoft applications, your administrators

17 would deploy your tested configuration from staging to production environment." Ex. 24

18 (ORCLRS0811822, at ORCLRS0811824). As reflected by these documents, the maintenance of

19 non-production software copies (*e.g.*, for development, testing, archival, disaster recovery,

20 troubleshooting and other support purposes) is the normal and customary practice in the industry

21 and, in my experience of reviewing hundreds of enterprise software licenses, there are seldom (if

22 ever) any contractual limits on the number of non-production copies that licensees can maintain.

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25   12.   When engaged, consultants likewise create and rely on non-production copies

26 of the software to provide services in connection with the licensees' use of the software. For

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example, development of custom modifications to prior code has historically occurred on computers maintained by the consultants with development occurring both in, and outside of, the United States. The motivation to have this work performed offsite (for purposes of convenience and cost, among others) remains similar today as when it first began in the early 1990s. In particular, the normal and customary way that a professional software development organization (such as a consulting organization) modifies and updates a customer's software is to create non-production copies of the software on the consultant's computer systems, such that the non-production versions of the software can be maintained and modified as needed. Oracle acknowledges that companies often "copy production data into staging or test environments to allow in-house developers or offshore testers to perform application development and application testing." Ex. 27 (ORCLRS0811866-72) at ORCLRS0811870. Oracle's website explains that it is "normal" for a single production instance of Oracle ERP software "to have ten or more corresponding test or development instance copies for use by several different teams of developers or departments."[1] In fact, Oracle provides its licensees tools to facilitate remote development work.[2]

13.   Further, several Oracle Partners acknowledge and promote the fact that they follow this industry custom when providing services to Oracle licensees. ████████████████ ██ ██ ██   Further, Astute Business Solutions, eVerge Group, CedarCrestone, and Summit Technology, all Oracle Partners, advertise on their websites the use of an "upgrade lab" on the consultant's computer

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[1] Mask Your Secrets Using Oracle Enterprise Manager, http://www.oracle.com/technetwork/articles/oem/havewala-datamasking-grid-166436.html (last visited April 20, 2012) (discussing data confidentiality concerns that should addressed "before providing an off-site or development copy of the database.").

[2] Masking Sensitive Data, http://docs.oracle.com/cd/E11882_01/server.112/e16540/tdm_data_masking.htm (last visited April 20, 2012) (describing a data obscuration tool that allows for test data to be shared with "external business partners such as offshore testing companies").

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systems wherein the licensee's environment is replicated and used to provide services to the licensee.[3] As one Oracle Partner explains, "Our PeopleSoft Center of Excellence hosts and manages an 'Upgrade Lab' which replicates the client environment at our offshore locations. The initial and most time consuming activities are carried out in our Upgrade Lab thus benefiting the clients with immense cost savings." Ex. 32.

14.   To provide their implementation and support services in an efficient and cost effective manner, third party consulting firms typically use the non-production copies of the software applications on their systems to develop the fixes and enhancements that they subsequently distribute to the licensed software users they support. Further, it is fully consistent with the customs and practices in the software industry for such consulting firm to provide cloned portions of applications software and updates to other customers licensed for the same underlying software,

[3] *See* Exhibits 32 to 35, which are true and correct copies of the web pages indicated below.

Ex. 32, Astute Business Solutions, Astute Labs
http://www.beastute.com/index.php?option=com_content&view=article&id=76&Itemid=191, (last visited April 20, 2012) ("Our PeopleSoft Center of Excellence hosts and manages an 'Upgrade Lab' which replicates the client environment at our offshore locations. The initial and most time consuming activities are carried out in our Upgrade Lab thus benefiting the clients with immense cost savings.");

Ex. 33, CedarCrestone, Inc., CedarCrestone PeopleSoft Upgrades,
http://www.cedarcrestone.com/media/documents/PSUpgrades.pdf (last visited April 20, 2012) ("CedarCrestone also offers a more stream-lined and cost-effective Upgrade Lab Solution, using [CedarCrestone's] state-of-the-art data center.");

Ex. 34, eVerge Group, Inc., PeopleSoft ERP Upgrades, http://www.evergegroup.com/software_upgrades.htm (last visited April 20, 2012) ("eVerge Group technical staff will copy the client database to external media for transport to the eVerge Group upgrade lab.").

Ex. 35, Summit Technology, Inc., PeopleSoft Upgrades, http://www.summitsti.com/services/peoplesoft-upgrades (last visited April 20, 2012) ("By taking advantage of an off-site [PeopleSoft] upgrade, we can manage your project in effective manner, because you can concentrate your efforts on your core business, and let us handle your upgrade in our state-of-the-art upgrade lab.").

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1   This practice by consultants reflects the fact that it is the actual ERP software that is licensed, not the

2   media or a particular embodiment of the software. ERP software venders customarily afford their

3   clients non-exclusive, perpetual, limited licenses to use the licensed software programs, while

4   granting multiple clients license rights to the same intellectual property. Therefore, the industry

5   practice of providing multiple clients updates or fixes created in a single development environment

6   permits efficient and cost effective development, while reflecting the practice of the software

7   vendors to license the same software to multiple clients. ████████████████████

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11   15.   I understand that Oracle has taken issue with Rimini's practices of

12 (a) maintaining local non-production copies of Oracle ERP software for its clients, (b) providing

13 cloned portions of applications software to customers licensed for that software, and (c) using one

14 copy of a development environment to create PeopleSoft updates that are ultimately delivered to

15 multiple clients. As explained in the preceding paragraphs, such practices and procedures are similar

16 to other leading consulting firms and follow generally accepted practices in the industry. Thus,

17 Rimini's practices are essentially similar to those of other contractors that provide software

18 consulting services and there is no reason to distinguish it from other such contractors.

19   16.   I also understand that Oracle has taken issue with Rimini's creation of RAM

20 copies of Oracle's software. As explained below, this contention is not supportable because the right

21 to make RAM copies of software and software environments is implicit in any license grant directed

22 to providing access or use of such software and its supporting environments. Otherwise, the right to

23 access and use the software would be ineffective and pointless because there is no way to actually

24 carry out such access or use (here for non-production purposes) without having at least a portion of

25 the software copied into RAM. For this reason, it is widely understood in the industry (and common

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practice) that license rights directed to the access and use of the software also implicitly include the right to make RAM copies of the software.

17.   I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed in the territorial waters of the Hellenic Republic (Greece) on April 26, 2012.

Brooks L. Hilliard CMC, CCP

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